United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

No. 76-1140

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA

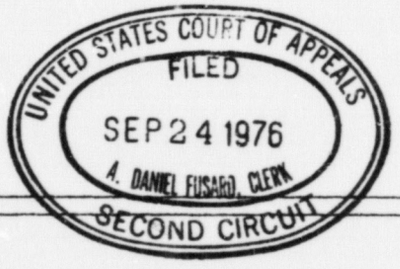
VS.

DAVID N. BUBAR, ET AL

AN APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT-APPELLANT

DAVID N. BUBAR



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INDEX

TABLE OF CITATIONS

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STATEMENT OF THE ISSUES

Was defendant denied his Sixth Amendment rights due to ineffective assistance of trial counsel who made a great variety and number of prejudicial mistakes and lacked even minimum competency,

(a) under the "farce and mockery of justice" test of this Circuit? or

(b) if not, under "competency" tests of other Circuits, which this Circuit should adopt?

STATEMENT OF THE CASE

Defendant was convicted by a jury on four counts: conspiracy to travel interstate with intent to promote an arson, violating the interstate travel act to promote such arson, interstate transportation of explosives used in such arson, and possession of an unregistered explosive device. 18 U.S.C. 1952 and 2, 371, 844(d) and 2, and 26 U.S.C. 5861(d). He was given sentences totalling 20 years by the Honorable Jon O. Newman, District Judge. He, and five others who were also convicted, appeal.

Briefly and generally, the government's case against Bubar was as follows: He was the spiritual adviser and industrial troubleshooter of defendant Moeller who had substantial or controlling interests in various corporations, including one which owned Sponge Rubber Plant No. 4 in Shelton, Connecticut. Bubar has ready access to some plants, and on several occasions in January and February 1975, he was seen in Shelton Plant No. 4 with some of the other defendants, to some of whom he was also linked by telephone calls in this period. He received two large checks from two of Moeller's companies at Moeller's direction; one was on February 28th and he cashed it in New York City before returning to Connecticut to meet defendant Peter Betres, who received checks from him. In late February, various explosive and incendiary materials were purchased and assembled in Pennsylvania, primarily by defendants Dennis Tiche and John Shaw. (Shaw pleaded guilty just before trial and became one

of the chief government witnesses.) On February 28th, the materials were driven in a rented truck to Connecticut by defendant Connors (who was acquitted). In the late morning of March 1st, Bubar obtained admittance of the truck to the plant on the pretext that it contained barrels of lime for a water treatment process, but the plant already had plenty of lime and the process he claimed to be developing for the plant was non-existent. He also obtained admittance of three other defendants--Shaw, Dennis and Michael Tiche, the "bombers"--on the pretext they were telephone installers, but no telephone installation was on order or necessary. Later, he brought in three more defendants--Just, Coffey and Ronald Betres, the "kidnappers"--who were to abduct the guards. According to Shaw, the materials were placed throughout the plant at Bubar's direction, a timing device was set, the kidnappers and bombers left. Shortly afterwards, at 11:35 p.m., the plant exploded into fire.

Several hours previously, Bubar had left the plant, had driven a company car to LaGuardia, and had from there obtained other transportation to his New York City hotel. Around midnight he made a telephone call concerning the fire, but then said he first learned of the fire between 3:00 and 4:00 a.m. on March 2nd when FBI agents woke him up in his hotel room. On March 2nd, he called a friend in Tennessee and asked him to say he was with Bubar at a Connecticut plant doing a telephone survey. No motivation for Bubar's involvement was established unless he was

proceeding at Moeller's direction for insurance purposes--and Moeller was acquitted. (See TR 10986 for court's marshalling of evidence and TR #79, p. 51 for court's comments on sentencing.)

Bubar's "defense" will be dealt with later but appeared to involve suggestions that this water treatment process was existent, that the money from Moeller pertained to it and/or the purchase of printing presses for his religious publications, that his prediction of the fire was not evidence of guilt because he had made other predictions which had come true, and that he, an ordained minister and man of God, was incapable of such a crime.

Bubar himself was presented as "Reverend" and as a psychic, seer, spirtualist, even a "prophet on earth". Certainly "different", others, especially counsel for Moeller, suggested he was crazy. (TR. 3245, 4293, 5559, 7687) His Connecticut co-counsel withdrew in the middle of the government's case because he had obtained substantial indicia of insanity and believed insanity was the only defense--an assessment accepted by neither defendant nor his New Jersey counsel, Mr. Zalowitz, who continued throughout the trial.

Zalowitz, paid a $2,500 retainer in late March, was Bubar's regular attorney, and repeatedly and reverently referred to his client as a leading psychic a l a prophet. On March 3, 1975, barely two days after the fire, he came to Connecticut with his client at the request of the FBI, and in his presence, Bubar made statements which the

government later used against him and which Zalowitz claimed were involuntary. With little criminal trial experience and investigation, he embarked in the representation of his client in an unorthodox, often bizarre, course of conduct, miscues, and downright mistakes in common sense, professional judgment, procedure, evidence, and law which continued and cumulated in prejudicial impact throughout the trial. These indicia of ineffectiveness, small, medium, and large, are summarized at the beginning of the Argument, and are set forth chronologically in a lengthy appendix which is necessary reading. (This appendix will be referred to either by page number [1a, etc] or by the number of the transcript page on which each mistake starts--or sometimes by both. In this brief and appendix, an asterisk * donates that the jury was not present.)

Counsel on this brief was appointed by this Court under the CJA to pursue defendant's appeal. However, due to Bubar's repeated applications, Zalowitz was given permission also to file a full brief. Counsel herein agrees with such brief only insofar as it may prove the point of this brief, or may happen to mention a bona fide issue on appeal. Counsel herein also relies upon and adopts those arguments on issues "common" to other defendants and assigned for briefing by lead counsel.

ARGUMENT

Summary: Bubar's trial attorney from New Jersey had minimal criminal trial experience there. Less than two days after the fire he allowed his client to give a statement to authorities in his presence; portions of it were later used against Bubar after he tried to keep it out as "involuntary". He conducted no investigation, but just prior to trial, Connecticut sponsoring counsel took him to the U.S. Attorney's office to review the government's file. He did not explore the defense of insanity, and after local counsel found good support for same and after he knew the strength of much of the government's case, he rejected what was the only reasonable defense In a woeful multitude of ways, he demonstrated ignorance of law, procedure, and evidence. His warped views on the First Amendment infected the proceedings, primarily by providing a "defense of God", under which a minister is somehow exempted from criminal responsibility. His examinations were constantly interrupted by objections of relevancy, redundancy, beyond the scope, leading, confusing, argumentative; and he was repeatedly admonished by the court. He clearly and constantly irritated the court and the jurors, and he was the butt of laughter. His cross-examinations were not only ineffective, but harmful in impression and sometimes in material he elicited. Following a lengthy in camera hearing at which the court heard and rejected nearly all his inane or unsupported requests for about 250 defense witnesses at public expense, the court more frequently asked

him for offers of proof, sometimes even before a defense witness took the stand; and the court even refused later to mark irrelevant or cumulative exhibits for identification. His rambling, ill-prepared direct examination of defense witnesses ran into repeated objections and judicial admonitions against religious beliefs and works, and mainly consisted of bringing out endlessly Bubar's predictions which had come true. His defense witnesses were either completely ineffective or very limited in materiality, no coherent defense strategy existed, and the probable effect of defense "evidence" and counsel's bizarre and antagonistic behavior was to destroy his client's credibility and image as a man of God, and to fortify the impression of insanity, the rejected defense. He was at war with Moeller; yet if Moeller had not ordered the arson, no rational motivation for Bubar's involvement existed--only irrational ones the irrational defense unwittingly supplied. His summation was awful.

Zalowitz's performance had no minimal trial competency and none of the professionalism a client should receive from a lawyer. The performance was more akin to a disciple echoing some message from the prophet; and there was much open reference to guidance from the Master above. Counsel's ineffectiveness drew the scorn of the court and of other defense counsel, who repeatedly claimed they and their defenses were tainted by having Zalowitz in the case. He was called crazy by one eminent attorney without admonishment. He was himself a farce and a mockery, with sham and

frivolous statements and defenses, and his completely ineffective assistance made a farce and mockery of justice. David Bubar, maybe insane but certainly unstable, thus was denied his fundamental Sixth Amendment right to counsel even under the older, more stringent test in this Circuit, and beyond all reasonable doubt under more recent tests requiring reasonable or normal competency from a criminal attorney.

I. COMPLETE INCOMPETENCE AND INEFFECTIVENESS OF DEFENDANT'S COUNSEL THROUGH ALL STAGES OF A LENGTHY TRIAL CONSTITUTED A FARCE AND MOCKERY OF JUSTICE AND THUS DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND A FAIR TRIAL.

A. Introduction And Statements By Other Counsel And Court Regarding Ineffective Assistance:

This is not a case where ineffective assistance is dredged up when there is no other valid issue on appeal. In order to establish the substance of the argument, and give some non-recordable but easily deducible courtroom atmosphere, counsel herein submits statements of competent counsel who were present at the trial.

The United States Attorney, anticipating this post-conviction claim, objected to the withdrawal of co-counsel, "because of the history of what's gone on so far in this case". A defendant's attorney stated that the "fears expressed in that [withdrawal] motion have been continually realized at every stage where co-counsel not withdrawn has taken over the proceedings." Moeller's counsel also objected. (10a).

*Two trial days thereafter, in arguing another motion for severance from the Bubar case, a defense attorney with the concurrance of another stated:

> "I think the concerns expressed by Attorney Sagarin in his pretrial motion have now come to fruition. Over the course of this trial, over the past few days, especially, we've seen--we've seen long, tedious, often wholly irrelevant if not meaningless and incomprehensible cross-examination. We've seen hostile examinations of witnesses of marginal relevance. We've seen inability to frame proper lines of questions . . . we've noticed reactions not only in the jury but in the Court as well. The Court has expressed its impatience with Mr. Zalowitz, expressed its irritation with his lines of questioning. It's cautioned and admonished him repeatedly throughout the trial to move to more relevant lines. It's indicated to him that he is delaying the proceedings . . . the jury's reacted not only to the Court's reactions to Mr. Zalowitz, but as well as to the lines of questions asked. We've observed jurors laughing. We've observed jurors groaning. We've observed signs of irritation on juror's faces . . . Our [other defense counsels'] credibility and our integrity is being diminished by being associated with the defense of Mr. Bubar." (12a)

During Bubar's defense, *Attorney Koskoff, Moeller's attorney and one of the ablest and most respected trial attorneys in Connecticut, exclaimed about Zalowitz, "He's crazy, he's absolutely crazy . . . You are out of your mind", and shortly thereafter that he is a "goddamn liar". Not only was Koskoff not admonished by the court, but as Zalowitz started to protest the latter remark, the court told him to be quiet or he'd be dismissed from the case (39-40a)!

In a post-conviction "memorandum in support of a motion of acquittal or for a new trial", filed February 13, 1976, counsel for Dennis Tiche stated:

> "Defendant Dennis Tiche contends that any chance for a fair consideration of his case by the jury was foreclosed by the misconduct and ineptitude of counsel to co-defendant Bubar, the co-defendant with whom he was alleged to have been intimately involved in connection with the supposed conspiracy. It is not simply that Bubar's counsel failed to present a convincing or comprehensive defense. Rather, he continually delayed the trial with frivolous objections, pointless questions, nonsensical and ungrammatical rhetoric, and the attempted introduction of absurdly irrelevant "evidence"; he repeatedly invoked mystical and psychic phenomena to explain events leading to and including the trial; he addressed both the court and the United States Attorney with sarcasm and disrespect; and he consistently failed to present arguments coherently, much less effectively.
>
> A few examples of incompetence of Bubar's counsel, with which the final transcript of this proceeding will undoubtedly be replete, include his objecting to the introduction of statements he himself authorized, his challenging witnesses' procurement of materials he in fact gave them, his objecting to the attempted introduction by other counsel of evidence which he himself had earlier tried to introduce, and his warning jurors of the divine consequences of finding his client guilty. He repeatedly violated the American Bar Association Code of Professional Responsibility, Disciplinary Regulation 7-106(c), sub-sections (1) (alluding to irrelevant matter); (2) (persisting in irrelevant and degrading questions); (4) (asserting his personal opinion as to the justness of a cause); (5) (failing to comply with standards of courtesy and practice); (6) (engaging in undignified and discourteous conduct); and (7) (habitually violating established rules of evidence and procedure). This astounding pattern of irrational behavior necessarily had the effect of deflecting the jury's attention from the issue at hand, in provoking the jury's impatience and resentment, and in trivializing not only his client's defense but the defense of every other co-defendant.

> Such behavior was highly prejudicial to Dennis Tiche, whose defense relied on maintaining his own credibility in the face of the testimony of John Shaw, the chief prosecution witness, who most seriously implicated in the conspiracy Dennis Tiche and defendant Bubar. The animus aroused against Bubar in the juror's minds combined with their likely inference that Bubar had no serious defense to present undoubtedly overflowed into bias and unfair skepticism against those linked with Bubar by Shaw's testimony."

Numerous comments and admonitions of the court implicitly reflect on Zalowitz's incompetency. Several really are inconsistent with the court's apparent view that effective assistance was somehow provided Bubar, and thus support the position taken in this brief: *

(a) In response to Zalowitz's protest of the court's use of the word "silly":

> ". . . I'll further assure you I have been using utmost restraint in not using it the countless times the word has been called [for], with the jury . . . but I don't want you to think for a minute by using it just this time I didn't think hundreds of other questions were entitled to that label . . ." (17a - 6123).

(b) The court asks for offers of proof concerning possible defense witnesses,

> "in view of the fact that you have called witnesses with little relevance to the case and asked innumerable questions with no relevance . . ." (31a - 7842).

(c) In asking for specificity and an indication of proper questions on cross of Moeller:

> "Had your examination over the course of nearly three months now not been so chronically irrelevant, I would'nt have to do this . . ." (39a - 8843).

And, as already suggested, the lack of admonition from a most fair and able judge to an attorney who calls another "crazy" and a "liar" is some indication of agreement with those harsh words.

B. The Law Concerning Effective Assistance:

This area has recently been surveyed in an Annotation "Modern Status of Rule as to Test of Federal Court of Effective Representation Counsel", 26 ALR Fed. 218, and no extensive discussion of the law is appropriate in view of the unique circumstances of this case and the reasoning and authorities of the case preceding the Annotation, Beasley v. United States, 491 F. 2d 687, 696 (6th Cir. 1974). That case adopted a modern, objective test which makes meaningful an accused's fundamental Sixth Amendment right to counsel. That test requires counsel "reasonably likely to render and rendering reasonably effective assistance", and is measured in part by counsel's performing "at least or well as a lawyer with ordinary training and skill in the criminal law". A similar test is that an accused be afforded counsel of "normal competency", as set forth in Moore v. United States, 432 F. 2d 730, 737 (3d Cir. 1970). By either competency test here, Bubar's trial counsel must clearly fail, for he did not perform with minimal competency, let alone normal competency in the field. It is hard to imagine that he participated before in any significant trial, civil or criminal, let alone a complex conspiracy case.

This Circuit, however, declined to adopt either test in United States v. Yanishefsky, 500 F. 2d 1321, 1333 (1974), and adhered instead to the older and more stringent test of counsel's performance "so woefully inadequate as to shock the conscience of the court and make the proceedings a farce and mockery of justice". Abandonment of this Circuit's test does not seem necessary in this case, unless the test is really another guise for "harmless error" or a conclusionary cover where evidence of guilt is strong. Abandonment would, however, be consistent with more recent legal thought, and with recommendations from the Chief Judge of this Circuit concerning competency standards for trial counsel. And abandonment would of course make the conclusion of ineffective assistance more easily demonstrable.

Not only has Zalowitz fallen far short of any minimally competent criminal attorney, not only has he fallen vastly short in comparison with each and every other lawyer in this conspiracy case, but also his continuing personal behavior and professional ignorance fall well into the realm where the words "farce", "mockery", "sham" and "frivolous" apply both literally and as legal conclusions. This Circuit's stringent test apparently requires a considerable degree of incompetency or ineffectiveness. Thus, some broad categorization of the multitude of major errors of omission and commission--some in addition to the Appendix--is presented in order to further demonstrate the extreme and pervasive degree to which Bubar's woefully inadequate

trial counsel made a farce and mockery of his constitutional rights.

C. Major Categories of Mistakes, Somewhat Chronological:

1. Lack of Experience - Zalowitz was allowed after extensive hearings to appear as Bubar's counsel of record but with strict limitations in Connecticut criminal proceedings arising from the same arson. (Attorney Meehan's withdrawal affidavit, Vol. 1, A, p. 10; 2d Supp. Rec.) A Superior Court Judge's October 16, 1975 finding on motion to review his application to appear pro hac vice is set forth in II of Suppl. Exhibits, and Paragraph 7 shows he had very limited trial experience in the New Jersey Superior Court, and in Paragraph 14, that he was able to name only two or possibly three criminal cases there that would be considered as having been tried to a conclusion in the past five years--"obviously his answer to the court's question as originally given [five to ten] was inflated and inaccurate". cf. United States v. Butler, 504 F. 2d 220, 224 (DC Cir. 1974).

Lack of experience in criminal cases is shown by his very first and irrevocably harmful act as purported attorney for Bubar after the fire. On Monday, March 3rd, he went with his client from New Jersey to Shelton and there permitted a several-hour tape-recorded interview of Bubar by federal and state law enforcement officials. Damaging portions of this interview were later testified to by FBI

Agent Slifka as part of the government's case. This testimony was permitted after an extensive voir dire in which Zalowitz tried to claim this statement given in his presence was involuntary! (14-15a). Zalowitz explicitly recognized then and later the harm done his client by this hasty statement (46a), and its presence for potential impeachment purposes was probably a key factor in Bubar's failure to testify in his own defense. There is little likelihood that Zalowitz could have obtained a complete story from his client in the short time following the fire, and there is no indication that he checked out at all some of the salient features such as the water treatment excuse and the telephone survey alibi, which proved on trial so damaging to his client. Any cooperation at all should only have been considered once the truth of the client's story was ascertained. Zalowitz committed a cardinal and unforgiveable sin for a criminal attorney, due either to lack of experience (and sense) and/or to a professional failing evident throughout the trial--a blinding belief in the client's innocence.

2. Lack of investigation - Attorney Meehan's withdrawal affidavit states, "Little or no investigation was ever conducted between July and the first week of October 1975"--from the time he was contacted to "sponsor" Zalowitz until he became actively engaged in the case. It was in September when Meehan, not yet active, took Zalowitz to the U.S. Attorney's office, where 2/3 to 3/4 of the file was made available (much had been available since June).

This was Zalowitz's unprofessional approach to a serious and highly complex criminal case.

He had filed a battery of pre-trial motions on June 26, 1975 (Vol. II, 83-102) but these were obvious copies of motions filed weeks earlier by other defendants (Vol. I, 5-74). He completely overlooked two motions which Attorney Meehan filed on October 10, 1975, as soon as he became active--a motion for the suppression of evidence (taken from the company car used by Bubar without a warrant) and a supplemental motion for discovery (as to such car's contents) (Vol. III, 140, 141; see 5a-2289). There was a hearing on the former motion and a correct denial of it (5a), but regardless of substance, Zalowitz overlooked standard motion applicable to his client alone which is usually worth a try, at least for discovery and witness-testing purposes.

Aside from a haphazard defense, there are several specific instances where Zalowitz was unprepared at trial, or didn't seem to know what was available to him since June from the government's file. Perhaps the most serious was that he was unaware of and had not listened to a taped telephone conversation with Bubar made by Mr. Wilhelm, his friend and communications expert, who refused to supply a false alibi. The U.S. Attorney made arrangements for Zalowitz to hear the tape before he started to cross-examine Wilhelm the next morning (5162*). Wilhelm's testimony on direct and cross was a disaster for Bubar.

Zalowitz did not get materials his client furnished in response to a grand jury subpoena and was unaware how to accomplish this (5827). He asked for time to talk with a witness (7515*), he asked questions of his client's brother who has little direct knowledge of the answers (25-6a), he asked questions of a minister for whom he was so poorly prepared that "predictions" came after the events (8079), and he called several defense witnesses who barely testified at all (7604, 7932, 8034, 8038, 8042, 8072, 8079, 10524). cf. United States v. Maxey, 498 F. 2d 474, 478 (2d Cir. 1974); United States v. Sanchez, 483 F. 2d 1052, 1058 (2d Cir. 1973), cert. den., 415 U.S. 991.

3. Ignorance of Law, Procedure, and Evidence - Zalowitz apparently thought the First Amendment, presumably meaning the freedom of religion clause, supported the following claims: *

(a) Questioning of prospective jurors' religious views (Vol. III, 131);

(b) In the trial of a minister, a jury of his peers must include clergyman (1716);

(c) The privilege of priest and penitent (1614);

(d) Freedom to travel by airline (for a minister?) (5289);

(e) Unconstitutional surveillance of customers by bank cameras (6082);

(f) The right of a minister not to testify (7818, 9191, 10396);

(g) No subpoenas of church records on criminal matters (5534);

(h) The requirement that each witness swear with his hand on the Bible (9017);

(i) The relevancy of a witness' and Bubar's religious views (24-27a);

(j) The right of witnesses at public expense to testify about religious freedom and rights (34a); and

(k) Some exemption of a minister from criminal accountability--"a defense of religion and God" (25a, 34-5a).

His misconceptions of the First Amendment as allowing God in courtroom and his Son, "a prophet on earth", to somehow stand above it all (being a mass of implicating evidence) was to pervade the trial and caused damage to a mere mortal on trial for a serious crime. Bubar's status as a minister has nothing to do with guilt or innocence, except in the generalized thought he would be a man of peace. Invocations of prophet, man of God and the First Amendment cannot overcome hard evidence.

Zalowitz moreover did not appear to appreciate the limited purpose of hearings regarding suppression of photo identifications (332, 412, 1364, 3415) or involuntariness of statements (5894) or that claims of prejudicial pre-trial publicity are not for the jury (8098). He was not

aware that suspects have to furnish handwriting exemplars (6399), and that a witness cannot give the jury opinions on the law (the First Amendment)(8068). He thought summations might come at the close of each defendant's case (8055), and he took an appeal to this Court on January 27, 1976 following conviction but before sentencing. (Vol. 1, A, p. 16 of Docket Entries; see January 29 and March 23 entries.) And, in an unbelievable in camera performance lasting for hours (20-23a), he challenged vaguely (on equal protection grounds?) the requirement of Fed. R. Cr. Proc. 17b that the issuance of subpoenas at public expense be shown to be necessary.

Counsel's ignorance of basis rules of evidence was surprising and largely unconstructed throughout the lengthy trial. His sense of irrelevancy was sweeping and persistent throughout. Time and again the court told him to "move on", to get to something pertinent, to stop wasting time; and, "How will that topic help the defense?" Apparently unaware at first of what an offer of proof was (see 11-12a) he had incessant trouble formulating them, and sometimes either gave up, or refused to make them. As the irrelevancies multiplied, the court called for more offers, even in advance of testimony (27-42a).

Overlooking the distinction between marking exhibits (3093, 5796), he had scores of marked exhibits refused admission as irrelevant and/or cumulative (Def. Ex 1060-1150 with few exceptions, 1202-6, 1231-45 except 1241 & 3).

Finally the court refused even to mark absurd exhibits for identification, insisting instead upon lists of them as Court Exhibits (9856, 10345*). Near the end of the trial the court indicated that there was no theory which permitted Zalowitz to attack what the government didn't even offer (10429*).

Usually in conjunction with irrelevancy, there were legions of repetitious questions--and admonitions from the court. Often the repetitions pertained to uncontroverted matters, and more and more objections to testimony and exhibits as cumulative were sustained.

Frequently, Zalowitz went beyond the scope of direct examination, often asking the same questions of numerous witnesses as if he had never heard prior objections and warnings (4433, 5035*). When he vehemently objected to "beyond the scope", he wasabruptly overruled (7719) as were most of his objections. He objected to leading questions on cross-examination and put leading questions on his direct examination (6614, 7515, 7550).

He had to be told that the Jencks Act entitled him only to copies, not originals (5822), that he could not read from documents not yet admitted in evidence (5554, 5796, 6093). Repeatedly confused in his questions and his statements of position, he was also confused between in-court identification, photo identification, and statements in 302's at variance with the witness' testimony (3433*, 5289).

Hearsay was a particular strain on him. He simply didn't know what hearsay was, or that a statement not introduced for its truth is an exception; and he didn't seem to learn during the trial (4187, 6368, 7550, 6898, 7795, 8432, 10355, 10524).

His main "techniques" were either to demand, "answer the question"--often interrupting a witness in the midst of an answer, or the questionable technique of asking an improper question and then withdrawing it, for which the court admonished him (4180, 7711). He unsuccessfully and acrimoniously objected to questions in other defendants' cases which did not involve his client (36-7a), and throughout he put many sweeping, or confused, or sometimes unintelligible questions.

4. Poor Cross-Examination of Government Witnesses - Zalowitz did not fail to cross-examine, indeed he did so endlessly--and improperly. cf. United States v. Ortega - Alvarez, 506 F. 2d 455, 458 (2d Cir. 1974); cert. den, 421 U.S. 910. Unnecessarily antagonistic to numerous witnesses of limited importance, he confronted important witnesses with only the weapons of hostility and haphazardness. His examinations constantly were interrupted by sustained objections and judicial put-downs, and beset with confusion and repetition, and they often proceeded too long. Thus, they were not only ineffective, but often turned out to be harmful. For instance, his cross of Shaw started with an irrelevancy (3039) and soon became low comedy on the word

"gleam"--to deduce--"g-l-e-a-m, . . . gleam. Not a tooth-paste." (3071). He got nowhere with Shaw, and probably helped fortify Shaw's direct testimony. On cross of Moeller's secretary, he went into a maze of irrelevant and repetitious and otherwise objectionable questions, many about prophecies (8a), which added to the foolish impression he was making .

Then, with co-counsel withdrawn and only last minute preparation for his encounter with Wilhelm, a friend and communications expert whom Bubar asked to establish a false alibi, Zalowitz claimed he was not attacking this crucial witness' credibility, twice reversed this position amid awkward, inconsistent and excluded questions, attacked the validity of the taped phone conversation not in evidence, and opened the door for the U.S. Attorney on redirect to elicit further damaging testimony (11a). The net result is that cross reinforced and supplemented Wilhelm's devastating "false alibi" testimony.

Zalowitz's cross of FBI Agent Slifka who testified to Bubar's statement, was marked by numerous irrelevant, repetitious, beyond the scope and argumentative questions. As in prior cross examination of FBI agents in suppression hearings, (1-4a) he did nothing to weaken direct testimony, and has through reinforcement and his own ridiculousness, harmed his client.

On the first witnesses who damaged Bubar's water treatment experiment excuse for being in the plant,

Zalowitz immediately went beyond direct and into hearsay problems and the court ended his examination because he could not abide by prior rulings (6368). On the other witness, he went from irrelevancy to failure to frame questions regarding bias, and then to pressing for a complete description of the process--which brought forth that Bubar (a) innoculated waste water with, "s-h-i-t. This is the word he used", and (b) was "vague about details". Zalowitz thus made his prophet look at least like a fool--and perhaps a guilty fool (19-20a).

5. Unethical and Bizarre Actions - Before going to the purported defense, the statements of other counsel in A above should be referred to. Many more examples supporting such statements were still to come in the trial. The court, which had already warned Zalowitz at least twice about misrepresentations and false statements (5172, 7429*), also had further occasion to question his integrity and honesty (39-40a, 42a, 44a, 48a) in spite of his invocatous of divine guidance. At that point, however, the jury had heard numerous objections sustained and repeated admonishments by the court about irrelevant, repetitious or argumentative questions. That Zalowitz was laughed at by everyone, irritated everyone and was even mocked by other counsel leaps from the record.

It is hard to imagine how Zalowitz could have maintained a semblance of credibility for himself or his client. It is hard to imagine how a prophet could have been

viewed as better than a knave or a fool. It is hard to imagine how a man of peace needed such antagonistic assistance, or how an innocent man caught in a web of damaging evidence could survive it.

The fu..damental point here is that the attorney-client relationship was severely impaired in all respects other than loyalty. Another relationship developed and became predominant--that of prophet and disciple. It mattered little who was the dominant force or cause. The responsibility was that of the purported attorney. He had not given his client objective advice, rational strategy, legal knowledge, or competent technique. He instead spewed out "the word", whether in generalities or inanities. He was fighting a great cause for a great prophet against great forces. He openly relied on guidance from the Master above--which is correct since he had no legal arsenal. Thus, with with no competency, little appreciation of what had already happened, a considerable measure of irrationality, and a jury that must have been incredulous of him and his client, counsel entered upon his client's defense case--and contributed further to his downfall.

6. Incoherent Defense and Strategy - Zalowitz's defense "strategy" had little more commendable than the inanities suggested in camera which he was not allowed to pursue with requests for 250 witnesses with many notable names, at public expense, regarding CIA machinations, FBI involvement, et cetera, (20-23a, 25a). He started without

any really apparent preparation with Bubar's neice, two brothers who were ministers, another minister and a seminar attender. Under directions to limit inquiries to predictions come true, he repeatedly attempted to get into religious beliefs of the witnesses and Bubar, the teaching of Bubar's churches, Bubar's psychic and spiritual works. This testimony was constantly interrupted by objections and warnings from the court. The niece was a study of irrelevancy, the first brother a study of nearly total hearsay, the spirituality seminar attender and minister studies of useless witnesses, and the second minister brother a study in objectionable "cumulation" and weird predictions of possible future happenings (24-27a). Moeller's counsel referred to his previous motion for a psychiatric exam of Bubar and claimed his mental state made it less likely Moeller committed a crime. The court responded that Zalowitz had already developed things that gave a basis for that claim! (26a)* This indicated that Zalowitz was unwittingly hurting his client's case--by making Bubar appear weird or unstable, and thus capable of concocting this harebrained scheme of undisguised arson.

Zalowitz then called a non-expert as to Bubar's claimed water treatment process, and asked a multitude of irrelevant or speculative questions, drew another open admonishment, and unintentionally provided humor by a riduculous objection and then a question (28-9a).

A columnist from the National Tattler brought forth some testimony regarding prophecies but disintegrated into irrelevancies. A "parishioner" from Memphis offered the worst of many bad examples of Zalowitz's non-technique of questioning, his sense of irrelevancy, and his disregard of court rulings--and the disastrous effect of such antics on the jury. Another church member got nowhere and Zalowitz stated his claim was to put "into proper focus who Reverend Bubar is, demon or saint"! (32a). Two other parishioners were also of no help, because their professed testimony was irrelevant, cumulative, or undisputed; and were quickly excused (33a).

Before the last two, Zalowitz called Moeller's brother, obtained some non-disputed information and then put questions about insurance coverage. At sidebar, the court asked him if he was trying to prove both Bubar and Moeller were guilty--and received no answer on how another alleged fire could help his client (32-33a). The door was opened to Moeller's attorney to cross that Bubar's corporate directorship had been terminated because he was acting "strange and peculiar", was going to run for President of the United States, and "all kinds of silly things like that at the time" (7976-9).

Zalowitz brought back the coordinating FBI agent, attempted to go over old ground, and was repeatedly frustrated, as he should have anticipated. After further resurrecting his incredible witness requests, he again tried

many of the same irrelevant questions of another church member from Memphis and a minister; and the latter was so ill-prepared, that it appeared that Bubar may have told him various predictions after the events occurred (35-6a).

Because Zalowitz regularly did not have enough witnesses ready (27a, 30-1a, 34-6a), the cases of other defendants went forward with interruptions for further witnesses "for" Bubar: another unhelpful FBI agent, a witness from Memphis on religious beliefs, and a witness to introduce someone else's affidavit.

Zalowitz made a feeble attempt to justify the water treatment excuse and he tried to show the money to Bubar was for legitimate purposes--water treatment consultation fees and/or to buy printing presses. And he did repeatedly through witnesses and through exhibits bring out Bubar's predictions to the point further ones were excluded as cumulative. (See Full Exhibits 1061-65, 1071, 1102, 1106, 1110, and 1156; and for ID 1060 to 1150 excepting full). While it was rational to attempt to offset the damaging inference from Bubar's prediction of the Shelton fire by a series of other predictions come true, he ground thin the patience of court and jury with all these predictions and with his constant attempts to spring into forbidden areas of religious beliefs and works. And he innundated the court with irrelevant exhibits which tended to show his absurdity or worse. (Consider the list: record albums by Bubar, The Bible (2 versions),"East Asia Millions", and books--

The Way to God, Satan on the Loose, Understanding the Bible, Glorious Koran, and You are a Psychic (Bubar's own story). (ID Exhibit 1203-06, 1231-32, 1236-38, 1240, 1242, 1245, 1155).

More pointedly, however, the defense of other predictions with its dangerous potential of showing the predictor to be crazy, would have been unnecessary had testimony about Bubar's fire prediction been excluded in the first place. Other counsel objected to it as prejudicial, but of course Moeller wanted it--and so did the leading psychic and his attorneys when Moeller's secretary testified (See Vol. 22, TR 4092-4110). It is questionable if a psychic's prediction of a future event where the psychic is later at the scene is admissible because of its high potential for prejudice. Anyone skeptical of psychics could reasonably conclude that he helped the prediction come true, in order to augment his reputation. The argument against admissibility is even stronger where there was a large amount of eyewitness and circumstantial evidence available to the government. Insofar as Attorney Meehan participated in the decision not to object, it was in the context of his developing defense of insanity, which shortly thereafter was aborted by Zalowitz. There appeared no justification for not objecting to the prediction, except a reasonable defense of insanity, or some weird pride of authorship in a most damaging prediction which thereafter had to be allayed. Whether in failing to object or in switching strategy, Zalowitz was at fault.

In essence, his strategy was ill-conceived whether his client was innocent or guilty. An innocent minister (if he had given a truthful statement to the FBI) should have taken the stand in the circumstances of this case. His testimony was also probably necessary if he really claimed frame or plot, and could not otherwise prove it. There was no reasonable way he could be found innocent with little more than the "defense" of a minister and prophet whose prior prophecies had come true. Or at least there was no reasonable way with an attorney who destroyed Bubar's credibility and any image of a peaceful visionary he might have had.

Lastly, there was no apparent attempt to assess Moeller's strong case. Moeller was linked to the arson mainly due to payments to Bubar, but the arson-for-insurance theory of the government's case had weaknesses which became apparent in Attorney Koskoff's cross-examination of government witnesses, and which were later opened wide in Moeller's defense case. Moeller had reason to paint Bubar as crazy; but Bubar had no apparent motivation unless he was acting at Moeller's direction. Zalowitz, however, was constantly in combat against Moeller and Koskoff. Not only that, he unwittingly supplied indications of Bubar's strangeness to the point where it was rational to conclude that Bubar himself set up this strange arson due to some weird fantasy or message. The way to try to avoid that conclusion was to adhere to Moeller and to present Bubar as solid, peaceful,

and rational, even though endowed with some psychic abilities. Had Zalowitz been prepared on the evidence or thought through the probabilities of success, he should have concluded on this strategy--or the defense of insanity.

7. Ridiculous Summation - Zalowitz's summation was anything but a good, professional job. cf. United States v. Maxey, supra, 498 F. 2d at 482. It could be called a sermon, due to frequent references to God, Satan, angels, and the Bible. It could more likely be considered blasphemous, due to frequent comparisons of Bubar to Christ. ("May I, but for a moment, transgress" [Suppl. Exhibits p. 22] is perhaps more a Freudian slip than another malapropism). It was certainly unethical, due to expressed personal beliefs of counsel in "the truth" and the repeated link of counsel and client in charge and trial through "we". It has to be read to be believed.

Whatever else the summation may be called, it represented sheer incompetence for a lawyer. Counsel did not mention the reasonable doubt burden on the government, or the lack of Bubar's motivation. Counsel followed no logical progression but stumbled along, full of repetition and Biblical poppycock. He paid little attention to facts or specifics, and whether due to those omissions, incoherence or pompous rectitude, his suggestions of valid arguments--Shaw's credibility, water reclamation, or even prophecies--were submerged as quickly as they surfaced. Counsel placed great reliance on the untenable claim that

Bubar could not take the stand because of his religious principles and position as a minister (8-10, 21). He even went on improperly to suggest that the government, and Shaw, were further picking on an unprotected Bubar because the Court under Rule 17 (b) didn't afford him necessary witnesses (21-25). He tried another cheap shot by calling the reference to "Reverend Bubar's car" a "big lie" (44), when he knew throughout the case this was shorthand for the company car driven by Bubar. This sort of absurdity reaches its nadir when, without any reason, he imputes "cover up" and possibly suppression of tape recordings to the government. If, however, the government is fair game for any fatuous comment, the truth of the courtroom derived from facts, logic, and law is not likely to be undone by Zalowitz's closing plea (53)--and inane but basic defense:

> ". . . please remember Reverend Bubar is annointed of the Master, and there's but one ring to the truth, and that truth is thataway [sic], on high."

8. The Rejected But Probably Valid Defense Of Insanity - Zalowitz rejected the very defense on which he inadvertently furnished considerable evidence. Insanity happens to have been the main avenue to a not guilty verdict for Bubar, in the opinion of the undersigned and of Attorney Meehan. Zalowitz in his devotion to the prophet didn't even explore it. cf. United States ex rel. Marcelin v. Mancusi, 462 F. 2d 36, 43 (2d Cir. 1972), cert. den., 410 U.S. 912; United States v. Currier, 405 F. 2d

1039, 1042 (2d Cir. 1969), cert. den., 395 U.S. 914. Reluctantly if belatedly, Bubar agreed to have Meehan investigate it; then with no apparent consideration, Zalowitz refused to allow it. Zalowitz so "decided" after Attorney Meehan had taken him to review the government's file, and after he knew the identification witnesses, and after Shaw and even Wilhelm had testified. He rejected it after there was good support by a well qualified psychiatrist and a clinical psychologist:

> "As a result of my conversation with Dr. [the psychiatrist] and Dr. [the psychologist], it appears that Mr. Bubar suffered from a mental disease, paranoia, and that a valid psychiatric defense could be presented in his behalf."

(Attorney Meehan's sealed withdrawal affidavit, 2nd Supp. Rec., which is supported by written confidential medical reports in his file.) The inability to separate fact from fantasy and belief in the infallibility of the prophet are consistent with paranoia--and were fostered by counsel's woeful performance.

D. The Court's Mistake:

What then was the ablest of judges to do? Bubar was not incompetent to stand trial; and Zalowitz was counsel of his choice--with the inside track. Attorney Meehan wanted out for good reason. At that point, the court did not see that the defense would become more irrational and inept, or that Zalowitz couldn't present a coherent defense on the facts if such existed. After all, to a considerable

extent Zalowitz could ride the coat-tails of competent counsel, at least in making motions and excluding objectionable evidence for the government. In hindsight, however, the court would probably have kept Meehan in the case and put Zalowitz in the role of silent co-counsel.

The difficult position of the court is not, however, the main consideration. The actuality is that Bubar had no real trial or defense (or even plea bargaining attempt) because he had a shockingly inept counsel to whose antics and ignorance the words "farce", "mockery", "sham", and "frivolous" applied both literally and as legal conclusions. An unstable if not insane Bubar couldn't truly consent to or condone such representation. Indeed his failure to protest the behavior and ignorance that occurred in his presence is itself some evidence of insanity, or a deluded belief that divine intervention would rescue him, when his incompetent disciple was obviously failing. To uphold Bubar's conviction after such a performance would be to misapply the farce and mockery test--or to demonstrate the need for its rejection or reformulation.

CONCLUSION

For the foregoing reasons, and/or common reasons argued by counsel for other appellants, appellant Bubar's conviction should be set aside and a new trial ordered. On the issue of ineffective assistance, counsel herein has considered a fallback position, in order to substantiate the defense of insanity, by (a) a direction to Attorney Meehan to furnish to this Court confidential psychiatric reports in his file, or (b) a remand to the district court to hear evidence on this aspect. However, even if it is assumed the insanity defense is insubstantial, this does not excuse trial counsel's woeful performance in all other respects. The consequent conviction is necessarily tainted and should not, in conscience or the constitution, remain. Thus, a reversal and new trial is called for--with competent counsel to explore the insanity aspect.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 1140

* *

UNITED STATES OF AMERICA,
Plaintiff-Appelle,

VS.

DAVID N. BUBAR, et al,
Defendants-Appellants.

* *

CERTIFICATION

This is to certify that I have this day caused to be mailed by first class mail, postage prepaid, one copy of the brief and supplemental appendix of David N. Bubar to each of the following: Peter C. Dorsey, United States Attorney (together with a copy of Supplemental Exhibits), P.O. Box 1824, 141 Church Street, New Haven, Connecticut 06511; Andrew B. Bowman, Esq., 770 Chapel Street, New Haven, Connecticut 06510; Gregory B. Craig, Esq., 30 South Street, Middlebury, Vermont 05753; Alan Neigher, Esq., 855 Main Street, Bridgeport, Connecticut 06604; J. Daniel Saragin, Esq., 855 Main Street, Bridgeport, Connecticut 06604; Igor I. Sikorsky, Jr., Esq., 111 Pearl Street, Hartford, Connecticut 06103; Rudolph Lion Zalowitz, Esq., 213 Ross Avenue, Hackensack, New Jersey 07601; and David N. Bubar, 40225, Box PMB, Atlanta, Georgia 30315.

Dated at Hartford, Connecticut, this 23rd day of September, 1976.

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9/24